SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

PRESERVE OUR ISLANDS, WASHINGTON ENVIRONMENTAL COUNCIL, AND PEOPLE FOR PUGET SOUND,

Petitioners,

v.

KING COUNTY AND NORTHWEST AGGREGATES,

Respondents.

NORTHWEST AGGREGATES,

Petitioner,

v.

KING COUNTY,

Respondent.

SHB NO. 04-009
SHB NO. 04-010

ORDER GRANTING AND DENYING MOTIONS TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT

This case concerns King County's denial of a Shoreline Substantial Development Permit ("SSDP") and Shoreline Conditional Use Permit ("CUP") for a barge loading dock at a sand and gravel pit on Maury Island owned by Petitioner Northwest Aggregates. (Referred to hereinafter by its parent company name Glacier Northwest, or "Glacier") Glacier filed a petition for review of King County's denial of its permit applications. Preserve Our Islands, People for Puget Sound, and Washington Environmental Council ("POI et al.") also filed petitions for review of certain aspects of King County's permit decisions. The Board consolidated the two appeals.

The parties have moved for partial summary judgment and/or dismissal on issues relating to the jurisdiction of the Board and on issues relating to interpretation of the King County Shoreline Master Program (KCSMP). Board members Bill Clarke, Presiding, William H. Lynch, Chair, Gordon Crandall, Darcie Nielsen, and Judy Wilson deliberated on the motion. The Board heard oral argument from the parties on July 28, 2004. Randi Hamilton of Gene Barker & Associates provided court reporting services. The Board has reviewed and considered the pleadings and other motion papers contained in the Board record, including the following:

1. Glacier's Motion for Partial Summary Judgment;
2. Declaration of Stephen H. Roos in Support of Glacier's Motion for Partial Summary Judgment;
3. Declaration of Ronald Summers in Support of Glacier's Motion for Partial Summary Judgment;
4. Proposed Order Granting Glacier's Motion for Partial Summary Judgment;
5. Glacier's Motion to Dismiss Petition for Review of Preserve Our Islands, People for Puget Sound, and Washington Environmental Council for Lack of Standing;
6. Proposed Order Granting Glacier's Motion to Dismiss Petition for Review of Preserve Our Islands, People for Puget Sound, and Washington Environmental Council for Lack of Standing;
7. Preserve Our Islands, et al.'s Motion for Partial Summary Judgment RE: Jurisdiction;
8. Declaration of David S. Mann;
9. King County's Motion to Dismiss and For Summary Judgment;
10. Proposed Order Granting King County's Motion to Dismiss and For Summary Judgment;
11. Declaration of Michael Sinsky in Support of King County Motion;
12. Motion for Summary Judgment on the Merits of Appellants Preserve Our Islands et al.;
13. Declaration of John B. Arum RE: Exhibits;
14. Glacier's Response to Motions for Partial Summary Judgment;

15. Declaration of Stephen H. Roos in Support of Glacier's Response to Motions for Partial Summary Judgment;
16. Declaration of Julie A. Munko in Support of Glacier's Response to Motions for Partial Summary Judgment;
17. POI et al.'s Response to Glacier's Motion for Partial Summary Judgment;
18. Declaration of John B. Arum RE: Exhibits;
19. Response of POI et al. to Glacier's Motion to Dismiss for Lack of Standing;
20. Declarations in Support of Standing of Appellants POI et al.
21. King County's Combined Response to Glacier and POI Dispositive Motions;
22. Declaration of Greg Borba;
23. POI et al.'s Opposition to King County's Motion to Dismiss for Failing to Name the Property Owner;
24. King County's Reply in Support of Motion to Dismiss and For Summary Judgment
25. POI et al.'s Reply Brief in Support of Motion for Summary Judgment;
26. POI et al.'s Reply in Support of Motion for Partial Summary Judgment RE: Jurisdiction;
27. Glacier's Reply to King County's and POI's Responses to Motion for Partial Summary Judgment;
28. Declaration of Stephen H. Roos in Support of Glacier's Reply to King County's and POI's Responses to Motions for Partial Summary Judgment;

Having fully considered the record in this case and being fully advised, the Board enters the following order.

I. FACTUAL BACKGROUND

Glacier's Maury Island Project and Surrounding Area

The Glacier mine site covers approximately 235 acres on the Southeast shore of Maury Island, which is a part of Vashon Island. Sand and gravel mining has occurred at this site since the 1940's. Glacier now owns the uplands and tidelands in the project area, while the bedlands are state-owned. In 1968, the predecessor owner of the site built a barge loading dock on

aquatic lands for the export of sand and gravel. From 1968 to 1978, the barge loading dock was used to export fill material to various waterfront construction projects in King County. During the 1970's, the mine produced up to 1.8 million tons of sand and gravel annually. Since 1978, Glacier produced between 10,000 and 20,000 tons of material per year for use on Vashon and Maury Island, not for export via barge. Also since the 1970's Glacier has renewed a number of permits for the site, including the King County grading permit applicable to the mine, and aquatic lands leases from Washington State Department of Natural Resources ("DNR") that relate to the barge loading dock. Glacier also submitted aquatic lands lease applications in 1999 and 2001. In 1993, King County issued a shoreline exemption to allow "limited repair and maintenance on an existing extractive industry pier." *Ex. 3 to Declaration of Stephen H. Roos* ("Roos Dec.")

Glacier is seeking to increase the quantity of sand and gravel mined and transported from the Maury Island site. While no fixed quantity of material has been determined, Glacier intends to mine a quantity for export off Maury Island using the barge loading dock. Up to 7.5 million tons of sand and gravel could be mined annually, if Glacier is awarded a contract to provide materials for the Third Runway project at Sea-Tac International Airport. Under Glacier's proposal, up to 193 acres of the 235-acre site would be mined over 11 to 50 years, depending on the rate of extraction. A 400-foot wide buffer from the shoreline would be observed for mining operations.

The mining process at the site would use bulldozers to excavate and push materials to collection feeders. The collection feeders would load a 48 to 54-inch wide conveyor belt that

would start landward of shoreline jurisdiction and then extend about 400 feet from shore over Puget Sound. The conveyor would vary in length from 1,200 to 3,400 feet, depending on where mining and collection occurs. The conveyor portion over Puget Sound would be enclosed in a 12-foot diameter steel pipe called a gallery. The end of the conveyor would use a telescoping spout to lower material into barges for transport off Maury Island. The dock itself would be approximately 400 feet long with seven mooring dolphins. At the maximum production rate of 40,000 tons/days, four 10,000- ton barges, or a higher number of smaller barges would transport material off the island.

Adjacent land uses include Gold Beach residential community approximately ½ mile to the northeast, Sandy Shores residential community approximately ⅓ mile to the southwest, 60 acres of forested land owned by the state, a variety of residential subdivisions and 5-10 acre homesites. In this area, Puget Sound and its shoreline are used for a variety of recreational and aesthetic pursuits, including boating, fishing, SCUBA diving, and bird-watching. While this area of Maury Island formerly had a number of sand and gravel pits, Glacier's facility is the last one in operation, and it is the only large sand and gravel facility in King County with water access.

Recent Permitting and Regulatory Process

In 1997, Glacier began the process to obtain necessary permits to repair or replace the barge loading dock. As part of the permit process, King County required SEPA review. SEPA review covered both shoreline and upland impacts and included a range of material quantities that could be exported from the mine through the repaired barge loading dock. King County

issued a Final Environmental Impact Statement in June 2000. Glacier then applied for a shoreline exemption for its barge loading dock repairs, as it had done in 1993

In May 2002, Washington Department of Fish & Wildlife issued Glacier a Hydraulic Project Approval (HPA) to repair the existing barge loading dock. On May 31, 2002, King County denied Glacier's request for a shoreline exemption, and advised Glacier that a Conditional Use Permit (CUP) and a Shoreline Substantial Development Permit (SSDP) would be required. Glacier appealed the shoreline exemption denial to Snohomish County Superior Court under the Land Use Petition Act; that appeal is now stayed pending resolution of these appeals. In September 2002, Glacier filed shoreline permit applications, though it stated in the permit application materials that it had reserved the right to argue that the barge loading dock proposal was exempt, and required neither a CUP nor a SSDP.

In November 2002, DNR sought to create several aquatic reserves, including an aquatic reserve along the East shore of Maury Island that could include aquatic lands adjacent to the Glacier facility. Glacier challenged that aquatic reserve designation, and ultimately reached a settlement agreement with DNR. Based on procedures established in the settlement agreement, the status of a Maury Island aquatic reserve is still being considered by DNR. It appears that shoreline-permitting matters are to be resolved prior to DNR acting on Glacier's aquatic lands lease applications submitted in 1999 and 2001. See WAC 332-30-122(1)(c) (Requiring acquisition of necessary permits prior to DNR action on aquatic lands lease application)

After issuance of the Final Environmental Impact Statement (FEIS), King County, Glacier, and interested citizens and environmental groups, including POI et al., engaged in public

comment and discussion regarding Glacier's proposal. A key concern was the impact to nearshore habitat, including eelgrass beds in the vicinity of the existing barge loading dock. To address this concern, Glacier agreed to modify its 2002 proposal by extending the conveyor and pier approximately 70 feet further into Puget Sound than the existing dock. This modification of the proposal triggered preparation of a SEPA Addendum, which was issued on May 28, 2003. Five days after issuance, King County withdrew the May 28, 2003 SEPA Addendum on the basis that certain public comments regarding Glacier's proposal had not been reviewed prior to issuance of the Addendum. The EIS Addendum stated "the proposed replacement dock is a water-dependent development" under the KCSMP, though the parties dispute the significance of this legal conclusion in an environmental review document. King County's Notice of Withdrawal of the EIS Addendum stated that a revised environmental document would be produced by a third-party consultant based on a review of all environmental information to date on the barge loading dock.

On March 16, 2004, King County issued a revised SEPA Addendum. The reissued SEPA Addendum did not discuss whether the barge loading dock was water dependent or complied with other provisions the KCSMP. On the same day, King County denied Glacier's SSDP and CUP applications on the basis that the proposed barge loading dock was not water dependent. King County's decision also determined that Glacier's proposal did not meet the requirements for a nonconforming use, although Glacier was not requested by King County to submit information to establish that a nonconforming use existed.

Glacier filed a petition for review with this Board. POI et al. also filed a petition for review with this Board. The cases were consolidated by Order of the Board.

III. STATEMENT OF THE ISSUES

The issues from the Board's pre-hearing order for which summary judgment and/or dismissal is sought are as follows:

Issue 1. Does the Shorelines Hearings Board have jurisdiction to decide whether King County's decision violates the due process clause of the Washington Constitution and United State Constitution, and if so, does King County's decision violate the due process clause?

Issue 2. Whether POI et al. are aggrieved persons with standing to challenge aspects of the County's shoreline permit decision and associated environmental review pursuant to RCW 90.58.180?

Issue 3. Whether the petitions of Glacier and POI et al. should be dismissed for failure to name an indispensable party: the owner of the bedlands upon which the proposed project would exist?

Issue 4. Does the Shorelines Hearings Board have jurisdiction to consider whether the proposed project qualifies for a shoreline permit exemption, and if so, does it qualify?

Issue 5. Does the Shorelines Hearings Board have jurisdiction to consider whether Northwest Aggregates can continue to use and operate the barge-loading dock without a shoreline conditional use permit, if so, can it do so?

Issue 6. Does the proposed project comply with the Shoreline Management Act, King County Shoreline Master Program, and other applicable law?

(a) Is the proposed project a prohibited industrial or commercial use under the KCSMP?

(b) Is the proposed project a water dependent use under the KCSMP and SMA?

(c) Does the proposed project meet the requirements for a nonconforming use in the KCSMP?

III. ANALYSIS

Summary Judgment Standard

Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In a summary judgment proceeding, the moving party has the initial burden of showing that there is no dispute as to any material fact. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

> If a moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. [Citation omitted.] Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.

Hash v. Children's Orthopedic Hosp., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). In ruling on a motion for summary judgment, the Court must consider all of the material evidence and all inferences therefrom in a manner most favorable to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Id.; Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960).

In the instant case the Board finds no disputed issues of material fact. Through their cross-motions for summary judgment, the parties concede there are no material issues of fact. Accordingly, the only questions remaining are matters of law. *Tiger Oil Corporation v. Department of Licensing*, 88 Wn. App. 925, 930 (1997).

Issue 1. *Does the Shorelines Hearings Board have jurisdiction to decide whether King County's decision violates the due process clause of the Washington Constitution and United State Constitution, and if so, does King County's decision violate the due process clause?*

King County moves to dismiss this issue based on the Board's lack of jurisdiction over state and federal constitutional issues. Glacier does not oppose the dismissal of this issue, and indicated it raised the issue to exhaust any administrative remedy on this issue. *Glacier Resp. to Mtns. for PSJ, at 3*. By long established precedent, the SHB has declined to consider constitutional issues raised by parties. *Eagles Roost v. San Juan County*, SHB 96-47 (1996) (Concurrence, citing other SHB decisions). Therefore, King County's motion to dismiss this issue is granted.

Issue 2. *Whether POI et al. are aggrieved person with standing to challenge aspects of the County's shoreline permit decision and associated environmental review pursuant to RCW 90.58.180?*

Glacier asserts that POI et al. are not aggrieved persons with standing to pursue this appeal, as POI et al. did not present sufficient evidentiary facts to show that a threatened injury is "immediate, concrete, and specific to him or herself." Glacier further argues that a party asserting standing bears the burden of establishing elements of standing. In response to Glacier's motion, POI et al. submitted declarations from members of each of the organizations providing information on how each individual-member could be harmed by Glacier's proposal. See *Declarations in Support of Standing of Appellants POI et al.* (Declarations of Pat Collier, Maurice Carpenter, Lisa Jaguzny, and Dayna Rodgers) Glacier argues in reply that POI et al. fail to cite a case in which a party that opposes the issuance of a permit suffers "injury in fact" when the permit they oppose is denied. Glacier also asserts that POI et al. provides no evidence that the proposed replacement dock will cause greater injury than the existing dock.

In determining a party's standing the Board looks at two issues: (1) whether the appellant has suffered an "injury in fact"; and (2) whether the appellant's injury is within the "zone of interests" protected by the SMA. *King v. Port of Vancouver*, SHB No. 97-17, at 5. (1997). SEPA standing is evaluated under a similar standard. See *Kucera v. WSDOT*, 140 Wn.2d 200, 212 (2000), citing *Leavitt v. Jefferson County*, 74 Wn.App. 668, 678-79 (1994).

The Board does not consider the comparative impacts from existing structures in determining standing. Thus, how the proposed barge loading dock differs from the existing dock in terms of its impact to POI et al.'s interest is not relevant to determine standing. The declarations submitted by members of POI et al. demonstrate recreational, aesthetic, and environmental interests within the zone of interests protected by SEPA and the SMA that could be harmed.[1] Glacier disputes that POI et al. can demonstrate "injury in fact" from King County's decision, based on the fact that the permits that would result in the injury claimed by POI et al. were denied.

Simply because King County denied Glacier's permits does not mean that injury to POIet al.'s interests could not occur. Whether or not the injury claimed by POI et al. could occur depends in part on the outcome of *de novo* review of King County's decisions. Thus, it is premature to assert that King County denial of Glacier's permit ensures that POI et al.'s interests will not be harmed. Further, the Board has consistently held that standing issues under the SMA must be viewed in the context of the statute's express purpose to preserve and protect shorelines.

[1] This motion was initially styled as a Motion to Dismiss based on the pleadings, but because it now includes submission of declarations it will be determined under the summary judgment standard of Civil Rule 56. See Civil Rule 12(c).

Redman v. Mason County et al., SHB No. 99-01 (1999), citing *King v. Port of Vancouver*, SHB No. 97-17 (1997); *WEC v. Whatcom County*, SHB No. 93-68 (1994). The interests asserted by POI et al. and its members are consistent with the SMA policies relating to protecting shorelines. Consequently, the Board denies Glacier's motion.

Issue 3. *Whether the petitions of Glacier and POI et al. should be dismissed for failure to name an indispensable party: the owner of the bedlands upon which the proposed project would exist?*

King County moved to dismiss the petitions filed by Glacier and POI et al. on the basis that both failed to name an indispensable party, the State of Washington Department of Natural Resources ("DNR"), which manage state-owned aquatic lands, including those upon which a portion of the barge loading dock would exist. Glacier and POI et al. argue that service upon DNR is not necessary, as DNR is not a party to the appeal and because no provision of the SMA or the Board's rules requires service upon a property owner not otherwise involved in the project or appeal. Even so, Glacier provided DNR with a copy of its petition for review filed with the Board. See *Exhibit A to Declaration of Julie A. Munko*.

Under the Board's rules, a petition for review must including "Identification of the parties, by listing in the caption or otherwise . . . " WAC 461-08-350(2). "Parties" is defined as "a person to whom any local government or agency decision is specifically directed" or "a person named as a party to the appeal, or allowed to intervene or joined as a party by the board." WAC 461-08-305(8). Service of a petition for review must be on Ecology, the attorney general, and the local government. WAC 461-08-355.

There is no provision in the SMA, SMA rules, or SHB rules that a property owner must be included as an indispensable party or served. The cases cited by King County that required

service on property owners do not relate to the Board's procedural rules, but rather, are land use decisions under a different statutory and appeals scheme. Further, the Board has previously determined that failure to join a property owner does not justify dismissal absent a showing of actual prejudice, and that the remedy for failure to join a property owner is to join the absent property owner, not dismiss the appeal. *Citizens Committee to Preserve Nookachamps Valley et al., v. Skagit County et al.,* SHB No. 93-14 (Order Denying Motion to Dismiss) (1993). King County's motion to dismiss Glacier's and POI's petitions for review based on failure to serve DNR is denied.

Issue 4. Does the Shorelines Hearings Board have jurisdiction to consider whether the proposed project qualifies for a shoreline permit exemption, and if so, does it qualify?

POI et al. and King County assert that the Board is without jurisdiction to consider the appeal of a local government's shoreline exemption determination. Under RCW 90.58.180, the Board has jurisdiction over appeals of the "granting, denying, or rescinding" of a permit, thus an exemption decision is outside the Board's jurisdiction. *Putnam v. Carroll*, 13 Wn.App. 201 (1975). However, in a number of recent decisions, the Board has stated that it has jurisdiction over shoreline exemption issues when the appeal is part of a permit appeal. In *Bandy v. Jefferson County*, SHB No. 89-8 (1989), the Board stated:

> "Under the case law the only way an exemption question can be entertained by the Board is in connection with a permit decision. If a permit has been granted, denied, or rescinded, then a party on appeal to the Board may raise exemption questions in connection with whether the permit application was properly ruled upon."

This principle from Bandy was restated in two 2003 Board decision, *Estes v. Stevens*

County, SHB No. 03-026 and *Kauppila v. Pierce County*, SHB No. 03-027. In this case, King County and POI et al. argue that because neither *Bandy*, *Estes*, or *Kauppila* actually involved an exemption decision coupled with an appealable shoreline permit decision, that these cases are dicta and not controlling on the Board. The arguments raised by the parties on the exemption issue in this case demonstrate the logic behind the Board's conclusion in the *Bandy* line of cases that exemption decisions can be appealed to the Board when coupled with an appealable permit decision. Allowing a party to appeal an exemption decision along with a permit decision appealed to the Board prevents the situation found here, where a shoreline exemption decision is appealed to a Superior Court under LUPA while the permit decision is appealed to the Board. The Board concludes that it has jurisdiction to hear shoreline exemption issues when part of an appealable shoreline permit decision.

In addition to jurisdictional arguments, King County asserts that the Board is barred from hearing the exemption appeal in this matter under the priority of action doctrine and because the exemption issue is not ripe. The priority of action doctrine holds that the forum that first gains jurisdiction over a matter retains exclusive authority over it. *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wn.2d 655, 675 (1991). The doctrine applies where the subject matter, parties, and relief sought are identical. *Id*. "The reason for the [priority of action] doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and or process." *Id*. Glacier argues that the priority of action doctrine is inapplicable, because the barge loading dock proposal for which an exemption was denied in May 2002, the one currently stayed before the Snohomish County Superior Court, is not identical to the Glacier proposal that is the subject of

the appeal now before the Board. Glacier is correct in that regard – the barge loading dock before the Board in this appeal includes the 70-foot extension added to avoid any possible impacts on nearshore eelgrass beds.

King County denied Glacier's exemption request in May 2002 on the basis that the proposal did not qualify as "normal maintenance and repair" under WAC 173-27-040(2)(b). Glacier appealed that denial, and then modified the barge loading dock proposal and sought permits as instructed by King County. This gives rise to King County's assertion that the exemption issue for the final dock proposal is not ripe for review before the Board as part of this appeal because Glacier did not submit a second exemption request for the modified dock proposal for which it sought shoreline permit approval. There is no evidence in record to support the conclusion that King County would have reached a different conclusion had it been presented with an exemption application for a second time, after Glacier modified its proposal at King County's request.

Now, however, King County has determined that Glacier's proposed project is neither exempt from shoreline permit requirements, and that it does not qualify for necessary shoreline permits. For this reason, the issue of whether the project subject to King County's permit decision is exempt from the shoreline permit requirement may be raised as part of the appeal of the shoreline permit decision. There is no risk of conflict with the exemption appeal filed in Snohomish County Superior Court, because that exemption decision relates to a proposal that is no longer being pursued. The Board rules that it has jurisdiction to determine whether the project is exempt from obtaining a shoreline permit as "normal maintenance and repair" under

WAC 173-27-040(2)(b). Because this question involves questions of fact not before the Board in these motions, this issue will be determined after the hearing.

Issue 5. *Does the Shorelines Hearings Board have jurisdiction to consider whether Northwest Aggregates can continue to use and operate the barge-loading dock without a shoreline conditional use permit, if so, can it do so?*

POI et al. asserts that the Board lacks jurisdiction because a determination of whether Glacier can continue to use and operate the barge loading dock without a shoreline conditional use permit is not the "granting, denial, or rescinding" of a permit which provides the Board jurisdiction under RCW 90.58.180. POI also argues that while RCW 34.05.240(1) authorizes parties to petition agencies for declaratory orders, that this provision applies to review of a rule, order, or statute "enforceable by the agency." Because the Board does not have enforcement authority over the SMA, POI states, this provision of the SMA is in applicable. Further, RCW 34.04.240(7) of this declaratory order provision requires the written consent of necessary parties, which has not occurred in this case. See *Noreen v. City of Burien*, SHB No. 03-006. Glacier did not provide a response on this issue.

This issue relates not to the permit decision that is the subject of the appeal, but rather, to rights Glacier may have to use the existing barge loading dock. As such, this issue seems to be a code compliance matter that does not concern the "granting, denying, or rescinding" of a shoreline permit under RCW 90.58.180. For this reason, the Board does not have jurisdiction over this issue and grants summary judgment to POI et al.

Issue 6. Does the proposed project comply with the Shoreline Management Act, King County Shoreline Master Program, and other applicable law?

Three sub-issues related to Issue 6 were brought before the Board for resolution on summary judgment. The Board is considering only those three specific issues in this decision, and will determine overall compliance with the SMA, KCSMP, and other applicable law based on the hearing on the merits.

Issue 6(b): *Is the proposed project a water dependent use under the KCSMP and SMA?*

In its denial of Glacier's shoreline permit application, King County concluded (1) In the Conservancy Environment, only water dependent uses are authorized waterward of the ordinary high water mark; (2) water dependency is based upon "a principal use;" (3) the barge loading dock was an accessory use to the principal use of sand and gravel mining, and (4) the principal use of sand and gravel mining is not water dependent, as the mine has been in operation for the last 25 years without the need for a land-water interface, the hallmark of a water dependent use. There is no disagreement among the parties as to King County's conclusions (1) and (2). KCC 24.24.030(A) makes clear that only water dependent uses are permitted waterward of the OHWM, and the definition of "water dependent" at KCC 25.05.590 is based on "a principal use." Thus, the sub-issues relating to water dependency for the Board to determine are those listed as (3) and (4) above.

This issue is the subject of lengthy cross motions for summary judgment. King County and POI contend that the barge loading dock serves the principal use of the site, which is the upland sand and gravel mine. They point to the fact that Glacier has mined sand and gravel at the site for the last 25 years without use of the barge loading dock, providing sand and gravel for use on Maury and Vashon Island. POI also states that sand and gravel could be transported off-island by ferry. Because the principal use of the site is the mine, King County and POI contend,

the project should be considered "water related," because while a land-water interface is not necessary for the mine, it would be economically advantageous for Glacier to be able to export sand and gravel from the barge loading dock. King County and POI also argue that neither the designations of the site under the Growth Management Act, King County's Comprehensive Plan or Zoning Code, nor Ecology's definitions of "water dependent" are of any consequence in determining the principal use, or whether the principal use is water dependent. Finally, POI and King County argue that Board and appellate decisions support King County's determination that the project is not water dependent, and thus cannot obtain an SSDP or CUP.

Glacier argues that the barge loading dock should be considered the principal use, and that it clearly requires a land-water interface and thus is water dependent under the KCSMP. In the alternative, Glacier contends that if the principal use is the sand and operation as a whole, that the operation is also water dependent. Glacier asserts that though the KCSMP regulations and policies are ambiguous as to whether the mining operation is authorized in the Conservancy Designation, the adoption of the KCSMP policies and regulations in 1978 at a time when the Glacier site was actively mining and barging sand and gravel indicates that King County could not have sought to prohibit such an activity. Glacier also argues that the water dependency determination should not be based solely on the operation of the mine in recent years, but must include consideration of the unique island location of the mine and the site's designations under the GMA and King County Comprehensive Plan. Glacier argues that Ecology's shoreline guidelines and Board and appellate decision support the conclusion that the barge loading dock and the mine are water dependent.

The Board's review of shoreline decisions is *de novo*, without deference to the decision of the local government. *McArthur v. City of Long Beach*, SHB Case No. 03-017 (2003), see also *Buechel v. Ecology*, 125 Wn.2d 196, 203 (1994). The Board must determine whether the gravel mine is authorized within the Conservancy Environment, what should be considered the principal use, and whether the principal use is a water dependent use.

This determination begins with an analysis of the KCSMP regulations and policies. The initial consideration is whether the KCSMP regulations and policies are unambiguous, or whether statutory construction is necessary. It is clear to the Board that the KCSMP regulations and policies are indeed ambiguous, as evidenced by the various statutory interpretations and construction principles provided by the parties. A shoreline master program is considered a statute that must be construed as a whole. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 730 (1985). In doing so, related statutory provisions should be read such that they are complementary, rather than conflicting. *Waste Mgmt. of Seattle, Inc., v. Washington Utilities & Transportation Commission*, 123 Wn.2d 621, 630(1994). In determining the meaning of words in a particular statute, the words must be placed in the broader context of related statutes and other provisions of the specific statutory scheme. *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11 (2002).

Mining in the Conservancy Environment

The KCSMP regulations and policies at issue are those adopted by King County in 1978. KCC Chapter 25.24 applies to the Conservancy Environment. The purpose of the Conservancy Environment is to "maintain their existing character . . . [and] to protect, conserve, and manage

existing natural resources . . . " KCC 25.24.010. KCC Chapter 25.24 does not expressly authorize or prohibit mining. The KCSMP policies, however, state "commercial and industrial uses other than commercial forestry, agriculture, fisheries, and mining should be discouraged." KCSMP Polices at 20, Policy 2. No other designation (urban, rural, natural) in the KCSMP policies discuss mining. The mining section of the KCSMP policies states "[m]any of the most valuable deposits of sand and gravel are located on the marine shoreline and in or near the beds of rivers. KCSMP Policies at 30. Viewed as a whole, the KCSMP regulations and policies can only be interpreted to allow mining uses in the Conservancy Environment. However, because mining is not expressly authorized, King County properly characterized mining as a conditional use. This is consistent with WAC 173-27-030(4), which defines a shoreline "conditional use" as "a use, development, or substantial development which is classified as a conditional use or is not classified within the applicable master program."

Principal Use

Resolution of the water dependency issue turns in part on the determination of what constitutes the "principal use," as "water dependent" is defined as "a principal use which can only exist where the land-water interface provides biological or physical conditions necessary for use." KCC 25.08.590. If the Glacier proposal is not "water dependent," then it would be considered "water related," which is defined as

> "a principal use which is not intrinsically dependent on a location abutting the [OHWM], but which . . . B. Gains a cost savings or revenue differentiating advantage, which is not associated with land rents or cost, from being located within the shorelines of the state that could not be obtained at an upland location . . . "

KCC 25.08.600

The "principal use" can be one of three things: (1) the conveyor and barge loading dock; (2) the upland sand and gravel mine; or (3) the entire operation, including both the conveyor and barge loading dock and the mine. In its decision, King County determined the "principal use" of the site to be the sand and gravel mine itself, rather than the barge loading dock, which King County characterized "as accessory to a resource mining use." As such, King County determined that the principal use, the sand and gravel mine, was "water related."

The KCSMP does not define "principal use." King County and POI et al. point out that the KCSMP terms docks and piers as "accessory" to residential or commercial development, and that consequently, Glacier's barge loading dock must also be considered as "accessory" to the principal use of mining. Glacier argues that the barge loading dock is the principal use, because it is the only use subject to shoreline jurisdiction.

Neither King County's decision nor the parties' briefing discusses the proper scope of analysis under a shoreline master program or SMA when a proposal, such as this, lies partly inside, and partly outside the jurisdiction of the SMA.[2] In such a case, "the Board has continuously ruled where buildings or structures, which constitute substantial development straddle the shorelines, those buildings or structures are subject to the regulations and policies of the SMA, through the permit system." *Laccinole et al. v. City of Bellevue et al*., SHB No. 03-025 (2004) (Conclusion of Law XLVII). This concept was clearly stated in an early shoreline case, *Merkel v. Port of Brownsville*: "It is also clear that lands adjacent to shorelines must also be taken in to consideration if the consistency stressed in the act is to be achieved." 8 Wn.App.

[2] King County did note "Here, however, while the County considers the mine to include both excavation areas outside the shoreline and conveyor transport facility within, the only exercise of shoreline jurisdiction invoked by County was as to activities in the shoreline jurisdiction itself." KC Resp. Brief, at 10 fn. 9.

844, 850 (1973). This concept further developed in a subsequent Board decision, *Weyerhaeuser v. King County*, SHB No. 155 (1975). That case involved shoreline permits issued by King County that regulated road and bridge construction within and outside of shoreline jurisdiction, and forest practices outside shoreline jurisdiction. The Board determined "the road and bridge are one project and hence, even though partly within and out of the shoreline, are subject to the permit requirements of the [SMA]. *Id.* at 8. However, the Board stated that the county could not regulate forest practices under the SMA because they did not qualify as "development." *Id.* at 12.

The Washington Supreme Court affirmed the Board's ruling, concluding

> Furthermore, the intended use of adjacent lands should be considered when taking any action under the SMA in order to achieve the coordinated development of the shorelines which is the object of the SMA. See Merkel v. Port of Brownsville [cites omitted]. Direct authority to regulate uses of lands adjacent to shorelines is limited in the SMA, however, to the function of land use planning. Only those developments within the shorelines are subject to regulation by permits. The Board's determination that logging practices outside the shoreline cannot be regulated by means of substantial development permits for developments within the shoreline accords, then, with the structure and language of the statute.

Weyerhaeuser v. King County, 91 Wn.2d 721, 736 (1979)

Two key propositions should be taken from the *Weyerhaeuser* case. First, while the SMA does not confer permitting authority outside shoreline jurisdiction, "the intended use of adjacent lands should be considered when taking any action under the SMA . . ." Second, consideration of lands adjacent to shorelines occurs "as a function of land use planning" . . . "in order to achieve the coordinated development of the shorelines which is the object of the SMA."

As it relates to this project, the concepts from the *Weyerhaeuser* and *Laccinole* decisions apply to Glacier's proposal. Glacier's proposal includes the conveyor system, extending

between 1,200 and 3,400 feet and the barge loading dock. The collection system and conveyor begin outside shoreline jurisdiction, and then transport material into shoreline jurisdiction to the barge loading dock, which is wholly within shoreline jurisdiction. The KCSMP's use of a "principal" use as the basis of water dependency could be considered at odds with the concepts of the *Weyerhaeuser* and *Laccinole* decisions, but this is avoided if the project itself is the principal use. Further, the conclusion of that the principal use is the integrated project is consistent with the historical operation of the project discussed below.

Based on these principles, the Board concludes that the principal use at issue is Glacier's sand and gravel operation as a whole, including the mine and proposed conveyor and barge loading dock.

Principal Use – Water Dependent or Water Related

With the principal use determined, the issue then becomes whether that principal use is water dependent or water related. In other words, can Glacier's mine and barge loading dock "only exist where the land-water interface provides biological and physical conditions necessary for use" (water dependent), or is it "not intrinsically dependent on a location abutting the [OHWM] but . . . gains a cost savings or revenue differentiating advantage . . . from being located within the shorelines of the state that could not be obtained at an upland location." (water related).

The parties take opposing viewpoints both as to the timeframe used to determine water dependency and as to whether the KCSMP in isolation, or other related statutes are relevant. POI argues that where there is an inconsistency between a shoreline master program and GMA

Comprehensive Plan designations, that the relevant shoreline provisions control because the SMA, as the statute applying specifically to shoreline uses, takes precedence over the GMA, a more general statute applying to all land uses. See *POI Resp. to Glacier Mtn. for PSJ*, at 6. King County and POI et al. use mine operations during the last 25 years, in which sand and gravel has been produced only for on-island use, as determinative that the project is not water dependent.

Glacier's timeframe for determining water dependency is both before and after the time period used by POI et al. and King County in answering the same question. Glacier argues that from 1968 to 1978, the mine produced a quantity necessitating off-island transport by barge, and that designations assigned to the mine by King County in 1994 dictate that similar off-island export be available when the mine resumes full production in the future. Glacier argues that it should be presumed that neither the GMA nor SMA are pre-emptive or have primacy, but rather, should be considered together and construed to be mutually consistent.

The GMA includes goals relating to natural resource lands, which include mineral lands. RCW 36.70A.020(8). Under RCW 36.70A.060, local governments are required to adopt development regulations for mineral resource lands designated under RCW 36.70A.170. Under RCW 36.70A.170, designation of mineral lands shall consider guidelines established by the Department of Community Development ("DCD"). In turn, DCD's guidelines state that "mineral resource lands means lands primarily devoted to the extraction of minerals or that have known or potential long-term commercial significance for the extraction of minerals. WAC 365-190-030(14). One of the factors to be considered by local governments in designating mineral

lands is "accessibility and proximity to the point of use or market." WAC 365-190-070(2)(d)(vii).

In 1993, King County issued Glacier a shoreline exemption for repairs to the barge loading dock. The following year, King County designated the site "Mining" on the 1994 King County Comprehensive Plan Land Use Map, and it is also identified as a "Designated Mineral Resource Site" on the 1994 King County Comprehensive Plan Mineral Resources Map. King County zoned the site "Mineral" under the King County Zoning Code, KCC Title 21A. King County's Comprehensive Plan, Policy R-505, states:

> ". . . [M]ineral resources shall be conserved for productive use through the use of . . . Designated Mineral Resource Sites where the principal and preferred land uses will be commercial resource management activities."

The GMA includes a provision to harmonize local shoreline master programs with Comprehensive Plans.

> The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county's or city's comprehensive plan. All other portions of the shoreline master program for a city or county adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

RCW 36.70A.480

Consistent with this provision of GMA, the KCSMP was adopted as a GMA development regulation. KCC 25.04.025. The Board has previously considered the issue of the relationship between the GMA and Shoreline Master Program, and has concluded that shoreline provisions must be construed to be consistent with GMA designations:

> "Additionally, we recognize the interrelationship between the Growth Management Act, RCW Chapter 36.70A (the "GMA") and the SMA. The Shoreline Master Programs adopted pursuant to the [SMA] are essentially zoning ordinances regulating development

> on the shorelines of the State. *Batchelder v. City of Seattle*, 77 Wn.App 154, 159, 890 P.2d 25 (1995). As such, they should be construed to work in concert with the GMA."

Yakama Indian Nation v. Central Pre-Mix et al., SHB No. 98-42, at 13 (1999).

The parties also disagree as to the effect of prior cases considering water dependency, and the effect of definitions of that term by the Department of Ecology. In *Ecology v. Mason County and Hama Hama*, SHB No. 115 (1976), the Board determined that a barge loading dock for a proposed sand and gravel mine along Hood Canal was "[a]t the most . . . arguably water related." CL IV. In *Friends of the Earth v. City of Westport et al*, SHB No. 84-63 (1995), the Board determined that a barge loading facility used to transport materials for oil exploration and production modules was a water dependent use. In *Groenig v. Yakima*, SHB Nos. 92-030/31, the Board concluded that "gravel mining does not ordinarily need or depend on shoreline location." The Board does not believe that either of these cases are on point in terms of how to interpret "principal use," "water dependent," and "water related" under the KCSMP. As *Groenig* indicates, the ordinary gravel mine may not depend on shoreline location, but this appeal involves a mine with a unique location, not only on a shoreline, but an island shoreline. *Hama Hama*, though similar in that it concerns whether a barge loading dock for a sand and gravel operation was water dependent, was different in that the site was not located on an island and the definition of water dependent applied in that case is narrower than both King County, and those used by Ecology.

Ecology Authority on Water Dependency

Glacier points out that Ecology's new Shoreline Guidelines, which "[reflect] shoreline management practice and decisions of the [Board], define a water dependent use such that it can

be "a use or a portion of a use." WAC 173-26-020(36). King County and POI et al. note that King County is not required to revise the KCSMP in accordance with the new guidelines until 2009, and that the definitions therein have no authority in this matter. The Shoreline Guidelines definition of "water dependent" based on "a use or a portion of a use," is consistent with the Board conclusion, *supra*, that the principal use to consider is Glacier mine and barge loading dock as a whole.

Even if analyzed under Ecology's definition of "water dependent," the "portion" of the "principal use" that is water dependent is the conveyor and barge loading dock. Consistent with Ecology's Shoreline Guidelines definition, Ecology's Shoreline Management Handbook expressly cites "barge-loading facilities" in the definition of water dependent uses. See *Ecology Shoreline Management Handbook* (2nd ed. 1994), at H-364. The Board notes that both Ecology's Shoreline Guidelines and Shoreline Management Handbook are frequently implicated by issues before the Board, and provide persuasive, though not binding authority. However, these sources are instructive and demonstrate that King County's conclusion that only the upland mining activity should be considered in the water dependency determination was in error.

From 1968 – 1978, the period of time in which the Glacier site operated as a regional source of sand and gravel, "the landwater interface provide[d] physical conditions necessary for" the delivery of commercially significant quantities of sand and gravel to Glacier's market. For example, the site provided fill materials for Port of Seattle properties in Elliott Bay. There is no dispute that during this period of time while the Glacier site operated at a commercially significant level, it required transportation of sand and gravel by barge. Under Glacier's

proposal, the mining and transportation of similar or greater quantities than those previously transported by barge also would require marine transportation.[3]

The operation of the mine, conveyor, and barge loading dock does not merely confer "cost savings or revenue differentiating advantage," but is necessary to operate consistent with its designation as a mineral land of long term commercial significance. Importantly, the average annual quantity of sand and gravel mined and trucked on Vashon and Maury Island in recent years, 15,000 tons per year, could be transported in only two barge trips in a single day, if 10,000 ton barges are used as proposed. The fact that the quantity of sand and gravel transported by barge in a single day would exceed the recent yearly production and market demonstrates the interrelationship between the mine and barge loading dock that makes the project the principal use and water dependent.

King County argues that if "subjective intent, as opposed to the intrinsic nature [the mine] were to determine whether a development is water dependent, the water dependency requirement would impose few practical limits upon island conservancy areas." *KC Mtn. to Dismiss and for SJ*, at 9. It is objective considerations of the Glacier project, however, that is the basis the water dependency conclusion, including the fact that objective evidence is clear that when operated at a commercially significant scale, the Glacier site requires barging of sand and

[3] POI states "Markets for sand and gravel exist on Vashon and Maury Islands and sand and gravel can be transported off-island by ferry." Citing Exhibit A, FEIS Text Volume 1 at 2-2. This source confirms that the local sand and gravel market averages 15,000 tons per year or about 20 trucks per day. However, there is no factual support in the cited document for the statement that sand and gravel can be transported off-island by ferry. Glacier states "It would require approximately three-hundred 30-ton haul trucks (with trailer) to transport the equivalent of a single 10,000 ton barge." Reply to KC and POI Mtn. for PSJ, at 26.

gravel, and the designation of the island site as a mineral land of long-term commercial significance is an objective action taken by King County in 1994.

The Board is not determining what quantity of sand and gravel production is necessary for a site to be a mineral land of long term commercial significance, or what "accessibility and proximity to the point of use or market" requires,

The Board does not have jurisdiction over these questions.[4] The Board has concluded "designation of [a] site as a natural resource land is designed to ensure continuation of gravel mining, not prevent it." *Central Pre-Mix*, SHB 98-42, at 14.

The Board is recognizing that at the Glacier site, marine transportation of sand and gravel was necessary to provide a quantity of material similar to that which Glacier proposes to mine and export now and in the future. The fact that the site has been used to mine a lesser "local" annual quantity until demand resumes does not mean that the necessity for barge transportation has been lost or diminished. The "necessity of the land-water interface" at this facility is consistent not only with the prior use of the site as a source of sand and gravel in King County, but also serves to give purpose and effect to the site's GMA mineral designations and to the KCSMP, which allows mining in the Conservancy Environment and acknowledges the marine location of sand and gravel as noted in King County's master program policies.

[4] There is little, if any, authority on these issues. As the CPSGMHB noted the designation of natural resource lands of 'long-term commercial significance' coupled with the directive to designate lands 'not already characterized by urban growth . . . is the most complex equation this Board has been asked to review to date." Twin Falls Inc. et al. v. Snohomish County, CPSGHB No. 93-3-0003, at 18. See also Spokane Rock Products v. Spokane County, EWGMHB, Case No. 02-1-0003 (Failure to show basis for not designating quarry, sand, and gravel pit with annual production of 100,000 to 150,000 tons annual as mineral resource land.)

POI et al's argued that to the extent a conflict exists between SMA and a different statute, the SMA, as the statute of specific applicability, should govern. For example, in a case involving the City of Seattle's SMP and building code, the Supreme Court concluded

> "The SMA is a 'state statute of general application basically intended for the protection of the environment rather than the quality of construction, and . . . to the extent of any conflict between the Seattle building code and SMA the latter must govern."

Ecology v. Pacesetter Constr., 89 Wn.2d 203, 214 (1977).

In *Pacesetter*, however, the Court found that compliance with building codes did not supplant compliance with SMA when a party had "willfully violated SMA by proceeding with construction without first obtaining a [shoreline] permit." *Id*. The Court so decided, in part, because the City's building codes and setbacks were not intended to protect shoreline views, unlike the SMA. Unlike that case, the issue of water dependency before the Board on summary judgment involves the question of whether a particular proposed use is authorized in specific location. That is a land use planning issue that invokes both the Legislature's direction that master program and comprehensive plans be consistent, and with the principle of statutory construction that related statutes be harmonized. The second issue, to be decided after the hearing, of whether the proposed use complies with the substantive policies and provisions of the SMA relating to use and protection of the shorelines, is a matter independent of GMA.

Issue 6(a). *Is the proposed project a prohibited industrial or commercial use under the KCSMP?*

King County determined that the principal use, sand and gravel mining, was not a prohibited industrial or commercial use under the KCSMP, but rather, was a resource use. POI et al. challenges this determination. KCC 25.24.070 expressly prohibits commercial development in the conservancy environment, while KCC 25.24.120 expressly prohibits

industrial development in the conservancy environment. The KCSMP regulations do not define either "commercial" or "industrial" uses. However, the KCSMP policies describe both terms:

> "Commercial development pertains generally to the use or construction of facilities for transaction and sale of goods and services as opposed to industrial development (together with ports) which pertains to the design and fabrication of products.

KCSMP Policies at 27.

The Board has previously used these definitions to apply to the use of the terms "commercial" and "industrial" in the KCSMP regulations. *Save Our Sound Citizens Comm., v. King County*, SHB No. 82-51, CL V (1983)

POI argues that dictionary definitions of the terms "commercial" and "industrial" should apply, and notes that the 9th Circuit has concluded that resource extraction can be considered an "industrial" activity. However, while dictionary definition may in some case be appropriate, "courts may resort to the applicable dictionary definitions to determine a word's plain and ordinary meaning unless a contrary intent within the statute appears." *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8 (1991). In this case, it is clear that resort to dictionary definitions is unnecessary and inappropriate, given that the terms are defined in the KCSMP Policies.

KCSMP Policies state "commercial and industrial uses other than commercial forestry, fisheries, and mining should be discouraged." KCSMP Policies at 20. As the Board concluded, *supra*, the intent of King County was to allow mining in the conservancy environment. In order to construe the KCSMP Regulations and Policies as a whole, it cannot be concluded that King County sought to prohibit sand and gravel mining in the conservancy designation as a "commercial" or "industrial" activity at the same time that it specifically stated that mining is not

discouraged. Furthermore, in both the former and present Ecology Shoreline Guidelines, "mining," "commercial development," and "industry" are distinct use classifications.

This comports with the King County Zoning Code permitted use table, in which "mining" is a resource use, which is distinct from commercial and industrial uses such as retail, wholesale, manufacturing. See Chapter KCC 21A.08

POI's Motion for Summary Judgment on this issue is denied.

Issue (6)(c). *Does the proposed project meet the requirements for a nonconforming use in the KCSMP?*

POI et al. moves for summary judgment that Glacier's proposal cannot be approved as a non-conforming use. KCSMP § 25.32.060 allows for the modification of a non-conforming use or development under the following requirements:

> A. Applications for substantial development or building permits to modify a nonconforming use or development may be approved only if:
>
> 1. The modifications will make the use or development less nonconforming; or
>
> 2. the modifications will not make the use or development more nonconforming.
>
> B. A use or development, non conforming to existing regulations, which is destroyed, deteriorated, or damaged by more than fifty percent of its fair market value at present or at the time of its destruction by fire, explosion or other casualty or act of God, may be reconstructed only insofar as it is consistent with existing regulations.

The Board concludes that resolution of this issue concerns issues of material fact that are not before it in these motions, but will be presented at the hearing. Thus, summary judgment on this matter is denied and the issue will go to hearing.

IV. ORDER

Issue 1. King County and POI et al's Motion to Dismiss Glacier's claims relating to state and federal constitutional violations is GRANTED.

Issue 2. Glacier's Motion to Dismiss the petition for review of POI et al. for lack of standing is DENIED.

Issue 3. King County's Motion to Dismiss the petitions for review of Glacier and POI et al. for failure to name an indispensable party is DISMISSED.

Issue 4. King County and POI's Motion for Summary Judgment on whether the Board has jurisdiction to hear issues relating to shoreline exemption is DENIED. The Board will determine whether Glacier's project is entitled to a shoreline exemption based on the hearing.

Issue 5. POI's Motion for Summary Judgment that the Board does not have jurisdiction to consider whether Glacier can continue to use and operate the barge-loading dock without a shoreline conditional use permit is GRANTED.

Issue 6(a). Glacier and King County's Motion for Summary that the proposed project is not a prohibited industrial or commercial development is GRANTED.

Issue 6(b). Glacier's Motion for Summary Judgment that the proposed project is a water dependent use under the KCSMP and SMA is GRANTED.

Issue 6(c). POI's Motion for Summary Judgment that the proposed project does not meet the requirements for a nonconforming use is DENIED.

DATED this 10TH day of August 2004.

SHORELINES HEARINGS BOARD

BILL CLARKE, Presiding

WILLIAM H. LYNCH, Chair

GORDON CRANDALL

DARCIE NIELSEN

JUDY WILSON